82-1182

Supreme Court, U.S.
FILED
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JAN 24 1983
ALEXANDER L. STEVAS
CLERK

No. .....

IN THE

Supreme Court of the United States

October Term, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

vs.

JIMMY L. NORMAN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented for Review.

1. Whether a jury instruction on the subject of causation in an action for personal injuries under the Federal Employees Liability Act, hereinafter FELA, may properly include the phrase "no matter how small".

2. Whether the overall jury charge in an FELA case, which uses the words "proximate" or "proximately" some fourteen times is prejudicially deficient if it does not include a definition of proximate causation.

3. Whether the principle of proximate causation must be included in the jury charge in an action for personal injuries brought under the FELA.

4. Whether a jury in a FELA case may award damages for future pain and suffering in the total absence of any evidence that the plaintiff will in fact have pain and suffering in the future.

List of All Parties.

All parties appear in the caption of the case.

Designation of Corporate Relationships.

Southern Pacific Transportation Company, filing this Petition for Writ of Certiorari as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Southern Pacific Company is the parent company of Southern Pacific Transportation Company.

Southern Pacific Transportation Company has an ownership interest in the following subsidiaries:

Central California Traction Company
Harbor Belt Line Railroad Company
Los Angeles Union Passenger Terminal
The Ogden Union Railway & Depot Company
Portland Terminal Railroad Company
Portland Traction Company
St. Louis Southwestern Railway Company
Sunset Railway Company
Trailer Train Company

Southern Pacific Transportation Company owns an indirect ownership interest in the following companies through its ownership of St. Louis Southwestern Railway Company:

Acton & Southern Railway Company
Arkansas & Memphis Railway, Bridge & Union Depot Company
Dallas Terminal Railway & Union Depot Company
Glascar, Inc.
Kansas City Terminal Railway Company
Main Street Warehouse Company
St. Louis Southwestern Railway Company of Texas
Southern Illinois & Missouri Bridge Company
The Southwestern Town Los Corporation
Terminal Railroad Association of St. Louis

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OPINIONS BELOW.

The memorandum opinion of Circuit Judges Alarcon, Poole, and Boochever of the United States Court of Appeals for the Ninth Circuit was filed on November 24, 1982, and is not yet reported. The Order for Stay of Mandate pending the filing of a petition for writ of certiorari in the clerk's office of the Supreme Court of the United States on or before January 12, 1983 was filed on December 20, 1982. The opinion and order are appended hereto as Appendix A.

JURISDICTION.

The unreported memorandum opinion of the Ninth Circuit was filed on November 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED.

Section 51 of Title 45, United States Code, reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

This action under the FELA arises from the injury to plaintiff Jimmy L. Norman while at work on May 11, 1978, while employed by defendant as a student foreman in its Maintenance of Way Department. He was working that day under the immediate supervision of section foreman R.J.

Parker at a derailment site near Ontario, California. Parker and plaintiff were assigned to go to another location approximately one-quarter mile distant, where the two of them were to raise and level the rails. They were instructed to travel to the new area on board a self-propelled tamping machine. Plaintiff and his foreman loaded a shovel and other tools on the tamper. Plaintiff stood next to the operator's cab holding on to a steel handhold while the tamper was moved to the new work area. Parker dismounted first, after the tamper came to a stop. As plaintiff began to dismount, he turned, tripped, lost his balance and fell to the ground, landing in a sitting position. Parker and plaintiff then looked and saw a shovel handle, which apparently had shifted during the brief transit, lying partially across the gate opening on the tamper deck.

At the time of impact, plaintiff felt a shock but no great pain. His back felt "tight" when he arrived home. He went to a chiropractor that same same night and had his back manipulated. The next day he went to his family doctor, Leslie Wyatt, M.D. who examined him and arranged for him to have the use of a traction device at home and for outpatient therapy at Doctor's Hospital. After a few weeks, plaintiff switched to the care of a Dr. Acord, who continued his therapy, prescribed an exercise program, and arranged to have him admitted in Memorial Hospital on July 17, 1978 where he stayed seven (7) days receiving physical therapy.

On August 30, 1978, plaintiff returned to work with Dr. Acord's approval and performed light work in the office only until September 15, 1978, when Dr. Acord ordered him off the job again. Dr. Acord then recommended that plaintiff enroll in a spinal back program at Memorial Hospital which would involve him being an inpatient for perhaps six (6) months. Plaintiff refused when he learned the program would require him to see a psychiatrist. An argument

between Dr. Acord and plaintiff over the psychiatrist issue followed and plaintiff switched to the care of a Dr. Olivett. This doctor prescribed continued physical therapy, first as an outpatient, and finally commencing October 9, 1978 for one week.

With approval of Dr. Olivett, he again returned to work on October 30, 1978 and worked on and off until May 7, 1979. Since May 7, 1979, he worked as a field supervisor without day-to-day physical problems but with flare-ups now and then until time of trial.

During trial, plaintiff would get a low backache walking from the parking lot to the courthouse which would go away after he sat down for awhile. His condition had not changed during the six months preceding trial. He felt more pain and stiffness upon arising during cold weather than in hot weather. Plaintiff stated that on occasion he had a feeling of numbness and tingling on the outside of his left leg and foot.

Dr. Charles E. Wexler, a radiologist and an expert in thermography, had a technician perform a thermogram examination of plaintiff on November 2, 1979. A thermogram is a "heat picture" which reads the infrared radiations emanating from the subject. Dr. Wexler interpreted plaintiff's thermogram as showing irritation of the 5th lumbar nerve on his left side. The thermogram does not indicate *why* the nerve root is irritated but simply that it *is* irritated. Dr. Wexler testified that the possible causes of irritation include muscular dimentis spasm, a tumor pressing on the nerve root, and infection around the nerve root, all of which Dr. Wexler considers unlikely; and a herniated lumbar disc pressing on the nerve root, or scarring of the nerve root, which he considers more likely. Dr. Wexler further testified that although not an orthopedist, he *thinks* that either condition *could* be caused by a fall such as that suffered by

plaintiff. He did not testify as to any prognosis for Mr. Norman.

No other doctor testified as to plaintiff's medical condition or prognosis.

The trial court gave an instruction, numbered for identification as No. 41, requested by plaintiff, which defined causation in the following terms:

> "For purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, *no matter how small*, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission. (emphasis added)
>
> "Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes." *Devitt & Blackmar*, Federal Jury Practice and Instructions, 3d Ed. (1977), Section 94.13.

Defendant timely objected to the giving of this instruction both in its written Objections to Plaintiff's Requested Instructions filed August 8, 1980, and in the oral discussion of proposed instructions in chambers on August 15, 1980 during trial.

Defendant requested that the trial court instruct the jury on the subject of proximate causation as follows:

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part whatever in actually bringing about or causing

> the injury. So if you find from the evidence that any negligence on the part of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY or plaintiff contributed in any way or manner toward any injury suffered by plaintiff, you will find that injury was proximately caused by such act or omission."

This instruction was identified as No. 42 in discussions between counsel and the trial court in chambers. It is a modification of Instruction No. 11.14 from California Book of Approved Jury Instructions with the objectionable words "no matter how small" deleted and the word "whatever" substituted therefor. This instruction was rejected by the trial court.

Defendant also requested the following instruction on the subject of proximate causation:

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission contributed in whole or in part, or played any part, in actually bringing about or causing the injury. So if you find from the evidence that any negligence on the part of defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, or plaintiff contributed in any way or manner toward any injury suffered by plaintiff, you will find that injury was proximately caused by such act or omission".

This instruction was identified as No. 43 in discussions between counsel and the trial court in chambers. It was rejected by the trial court. This instruction was also modified from Instruction No. 11.14 from California Book of Approved Jury Instructions by substituting the statutory phrase "in whole or in part" for the objectionable phrase "no matter how small".

Defendant requested an instruction which was identified in discussions between counsel and the court as No. 36 which, as modified in those discussions, read as follows:

> "It was the continuing duty of the plaintiff to exercise ordinary care for his own safety. If he failed in such duty he himself was negligent. If his negligence was the sole proximate cause of his injury, then he may not recover." (Defendant's Requested Jury Instructions, B.A.J.I. 11.18, modified.)

This final proposed instruction on the subject of proximate causation was rejected by the trial court.

The jury verdict awarded plaintiff total damages of $150,000. There were three items of possible damage submitted to the jury:

1. Past wage loss, in an amount claimed by plaintiff's counsel in final argument to be $11,321.00.

2. Past pain and suffering, in an amount claimed by plaintiff's counsel in final argument to be $29,750.

3. Future pain and suffering, in an amount claimed by plaintiff's counsel to be $211,984.

The jury verdict also assessed fifty percent of the comparative negligence to plaintiff, thereby reducing the amount of judgment to $75,000, plus interest and costs.

ARGUMENT.

The decision below should be reviewed because it erroneously interprets both the Federal Employers Liability Act and this Court's decision in *Rogers v. Missouri Pacific Railway Company*, 352 U.S. 500, 1 L.Ed.2d 515 (1957). The decision of the Court of Appeals decides two important questions of federal law, which should be, but have not been settled by this Court, and which are likely to recur.

These two issues are what is the proper content of the causation instructions in an FELA case, and whether a jury in an FELA case may award damages for future pain and suffering in the complete absence of testimony that future pain and suffering will exist.

Further, there exists a conflict on these two issues among the decisions of the various courts of Appeals.

Point I

This Court has not spoken authoritatively on the proper content and wording of causation instructions in jury trials under the FELA.

It is clear that the common law doctrine of proximate causation was modified by the adaption of the FELA. *Coray v. Southern Pacific*, 335 U.S. 520, 93 L.Ed. 208 (1949). *Rogers v. Missouri Pacific, supra.* Virtually every case since 1957 involving causation under the FELA cites *Rogers* for authority. Defendant contends that the decision in *Rogers* has been misinterpreted by many of the subsequent decisions of the courts of Appeals, including the decision of the Ninth Circuit herein.

In *Rogers* the Court granted certiorari to determine if the court below had invaded the jury's function, and eventually held that the Supreme Court of Missouri had erred in holding as a matter of law that the evidence did not support the jury verdict for the plaintiff railroad employee. The court did not

consider nor comment upon instructions in FELA cases, a fact subsequently noted by several Court of Appeals decisions. *Bertrand v. Southern Pacific*, 282 F.2d 569 (1960, 9th Cir.). *Funseth v. Great Northern Railway*, 399 F.2d 918 (1968, 9th Cir.). *Ely v. Reading Company*, 424 F.2d 758 (1970, 3rd Cir.). *Idzojic v. Pennsylvania Railroad Company*, 431 F.2d 1029 (1970, 3rd Cir.). *Page v. St. Louis Southwestern Railway*, 312 F.2d 84 (1963, 5th Cir.).

A similarly impressive list of cases have held, to the contrary, that the *Rogers* decision does require new and modified causation instructions in FELA or Jones Act cases. *DeLima v. Trinidad Corporation*, 302 F.2d 585 (1962, 2d Cir.). *Hausrath v. New York Central Railroad Company*, 401 F.2d 634 (1968, 6th Cir.). *Parker v. Atchison, Topeka, & Santa Fe Ry. Co.*, 263 Cal.App.2d 675 (1968). *Waller v. Southern Pacific*, 66 Cal.2d 201, 57 Cal.Rptr. 353 (1967). *Dutton v. Southern Pacific Transportation Company*, 576 S.W.2d 782 (Tex.S.Ct., 1978).

This Court is the only court which can settle the controversy about the meaning of the *Rogers* decision authoritatively. The issue of proper wording of causation instructions recurs frequently, in every FELA trial in fact, and should be finally resolved by the court.

Point II

The principle of proximate causation should be included and defined in the instructions to the jury in an FELA case.

Although the common law doctrine of proximate causation was modified by the adoption of the FELA, the doctrine was not eliminated. It remains proper to instruct the jury on the meaning of proximate causation in connection with the use of the phrase "in whole or in part" from 45 U.S.C. 51 which modifies the common law doctrine of

proximate causation in FELA cases. *Funseth v. Great Northern Railway Company, supra. Iannacito v. Denver & Rio Grande Western Railroad*, 380 F.2d 1019 (1967, 10th Cir.). *Tyree v. New York Central Railroad Co.*, 361 F.2d 319 (1967, 6th Cir.). In conflict are cases holding it is error to give a common law proximate cause instruction. *Hausrath v. New York Central, supra. Almandarez v. Atchison, Topeka, & S. Fe Railway*, 426 F.2d 1095 (1970, 5th Cir.). *DeLima v. Trinidad Corp., supra.*

This conflict can only be resolved by this court.

In this case, Defendant's Instruction No. 43 on the subject of causation, contained a definition of proximate causation couched in the "in whole or in part" terminology of the statute. Its rejection by the trial court constituted reversible error, but the opinion of the Ninth Circuit blandly states:

> "The jury instructions correctly stated the law regarding the standard of causation applicable in actions under the FELA. See *Rogers v. Missouri Pacific Railway*, 332 U.S. 500 (1957); *Devitt & Blackmar*, Federal Jury Practice and Instructions, Instruction 94.13 (3rd ed. 1977)". Moreover, the causation instruction did not confuse the jury by failing to refer to "proximate" causation. In light of the instruction cautioning the jury that all the instructions were to be taken together, the jury could be expected to understand that the causation instruction given also included the principle of proximate causation in other instructions."

The Ninth Circuit opinion here explicitly concedes that the principle of proximate causation should have been included in the causation instruction given (as in the instruction tendered by defendant, but rejected). The opinion then avers that the jury could read into the causation instruction the principle of proximate causation as found in other instructions. This reasoning is faulty because nowhere in the entire

charge to the jury was proximate causation defined or explained.

The jury charge contained the word "proximate" or "proximately" some fourteen times. The definition of "proximate" would normally come in the causation instruction, such as No. 42 or No. 43 tendered by Southern Pacific. The causation instruction given, *Devitt & Blackmar*, No. 94.13, has omitted the definition of proximate causation. Thus, the jury in the instant case received fourteen confusing references to proximate causation and no explanation at all of the term "proximate causation" in the causation instruction given. Defendant contends this is error requiring a new trial with proper instructions.

Point III

Inclusion of the phrase "no matter how small" in an FELA causation instruction is prejudicial error.

The causation instruction given included the argumentative phrase "no matter how small" as found in *Devitt & Blackmar*, 94.13. Instruction No. 41 is taken from the third edition of *Devitt & Blackmar, supra*. It is the direct descendant of an instruction originally published by U.S. District Court Judge William Mathes, in his article "Jury Instructions and Forms for Federal Civil Cases" published at 28 FRD 497. In the original version, the objectionable phrase "no matter how small" does appear but the use of the modifying phrase "proximately caused" also appears, as follows:

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury. So if you find from the evidence that any negligence on the part of the defendant contributed in any way or manner toward any

> injury suffered by plaintiff, you may find that injury was proximately caused by defendant's act or omission."

The same instruction in the same words was included in the book *Federal Jury Practice and Instructions* jointly authored by Judge Mathes and Judge Devitt in 1965. By the time the second edition came out in 1970, Judge Mathes had died and was replaced as a co-author by Professor Blackmar. The subject instruction is included in that edition as Instruction No. 89.13 and reads the same as Instruction 94.13 in the third edition, tendered and given in this case. When Judge Mathes drafted the original version of this instruction, he apparently based the phrase "no matter how small" on the two words "however small" found in the dictum portion of the *Rogers* case, when the court commented that "for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." 352 U.S. 500, 507, 1 L.Ed. 2d 493, 500.

The argumentative aspect of "no matter how small" should be fairly obvious. Reference to the argument made by Edwin C. Martin, counsel for plaintiff, in the instant case is illustrative.

Mr. Martin employed the phrase "no matter how small" five times in his argument to the jury. Practically his first words to the jury in argument were these:

> "One important principle is on the subject of causation. You will hear the court instruct you on this and it says that if the negligence of the railroad played any part, *no matter how small*, any negligence on their part, caused any damage to the plaintiff, then they are responsible for it.

> "Now the exact wording will come from the judge and you will hear the judge say that and hopefully you will remember what I have said.
>
> "Now, that is protective, broad and sweeping. A grain of sand in any negligence, *no matter how small*, renders the railroad liable." (emphasis added)

This is mysterious logic and must have been confusing to the jury. Mr. Martin then went on to argue:

> "Now, let's review some of the evidence and try to fit the facts upon against this law saying that any negligence, *no matter how small*, and any negligence, comparative negligence, which I will be talking about in a minute to you, where you are going to balance negligence that you will find on the part of the plaintiff and any you find on the part of the defendant." (emphasis added)

Here again, counsel for plaintiff is emphasizing that the important thing for the jury to remember about this law is "no matter how small".

Later in argument, counsel for plaintiff talks about comparative fault:

> "And this is a separate question from that first legal instruction I was talking to you about on the subject of causation. Remember the first one says that the railroad — anyway, *no matter how small*, was negligent — at negligence, played any part in causing any damage, they are responsible. Okay." (emphasis added)

The final reference to "no matter how small" in plaintiff's argument was in these words:

> "You will remember that we talked about causation. Any case *no matter how small*, any negligence, any damage, and you will hear that." (emphasis added)

The message that counsel for plaintiff is apparently preaching in this part of his argument is that railroad plus "no matter how small" equals railroad is liable. This chain of logic is certainly simple enough for a jury to understand which probably explains Mr. Martin's repeated use of the magic phrase. Defendant submits that while simple, it is also improper and misleading and should not be condoned by this Court. Neither should the trial courts sponsor the use of the argumentative polemic "no matter how small" in place of the perfectly adequate phrase "in whole or in part" provided in 45 U.S.C. 51.

The use of "no matter how small" subverts the FELA and places the trial court's thumb squarely on the plaintiff's side of the scales of justice, and virtually guarantees a verdict against the railroad. The decision in *Rogers* does not so tip the scales of justice.

The statutory phrase "in whole or in part" is much to be preferred to the argumentative "no matter how small". The use of "in whole or in part" has been endorsed by several Courts of Appeals, including the Third Circuit, *Ely v. Reading Company, supra*, the Sixth Circuit, *Morrison v. New York Central*, 361 F.2d 319 (1966, 6th Cir.). *Tyree v. New York Central, supra*, and the Tenth Circuit, *Iannacito v. Denver & Rio Grande, supra*.

Refusal to give the "no matter how small" instruction was held on appeal to be without error in *Iannacito* and *Tyree*. In a Texas case, the trial judge excised "no matter how small" from the tendered instruction and the Texas Supreme Court made no criticism. *Dutton v. Southern Pacific, supra*.

Railroad defendants are entitled to have the crucial subject of causation explained to the jury without the use of the emotional and argumentative phrase "no matter how small."

Point IV

A jury in an FELA case may not award damages for future pain and suffering in the absence of competent testimony that future pain and suffering will occur.

While this Court has not expressly ruled on the question, all eleven circuits are today committed to the doctrine that there should be some appellate supervision over the size of jury verdicts. 6A Moore's Federal Practice §59.08(6).

There is a line of cases holding that where there is insufficient evidence to support the verdict as to damages, new trial should be granted. The Ninth Circuit, sitting in bank, declared upon review of an FELA case:

> "We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced. Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case." *Southern Pacific Co. v. Guthrie*, 186 F.2d 926, 931 (1951, 9th Cir.)

This is such a case.

The *only* medical evidence received at trial was the testimony of thermographer Dr. Charles Wexler, whose testimony, interpreted in the light most favorable to plaintiff, is that *on November 21, 1979*, plaintiff, by thermogram examination, was shown to have irritation of the 5th lumbar nerve on his left side. Counsel for plaintiff conceded in final argument that this is the *only* medical evidence in the case. There is no evidence of diagnosis or prognosis by any other medical doctor. Dr. Wexler's opinion that on one day in

1979 plaintiff had an irritated nerve root cannot be stretched into a prognosis of future pain and suffering.

Not only did no *medical* witness testify as to the probability of future pain and suffering on the part of plaintiff Jimmy L. Norman, but there was no such testimony from *any* witness. Plaintiff himself testified as to intermittant pain and suffering from the date of injury up to the time of trial, but of course could not and did not testify as to future pain and suffering.

As a general rule, damages for future pain and suffering cannot be recovered in a personal injury action if there is no evidence that pain and suffering will continue in the future. There is an excellent annotation on this subject at 18 A.L.R. 3d 10. One line of cases requires that there must be *medical* testimony that the pain and suffering will continue in the future. *Campbell v. American Foreign SS Corp.*, 116 F.2d 926 (1941, 2nd Cir.), *cert. den.* 313 U.S. 573, 85 L.Ed. 1530. In that case plaintiff received a jury verdict under the Jones Act, including an award for future "cure and maintenance". The trial court reduced the amount of this award but left intact three years' "cure and maintenance" in the future. The Second Circuit reversed, stating that the evidence was insufficient to sustain either the jury verdict or the reduced amount directed by the court. The opinion notes that:

> "No physician predicted that the plaintiff would be incapacitated for three years beyond the date of trial." Page 928

and

> "The medical testimony is too indefinite to justify a verdict based on an award of maintenance at $2.50 for a term of three years." Page 929.

In a 1962 case, the Supreme Court of Wisconsin held that the unsupported subjective statements of the injured

party were not sufficient to allow recovery for future pain and suffering and that competent objective medical findings were necessary. *Lucas v. State Farm Mutual* (1962) 17 Wis. 2d 568, 117 N.W. 2d 660, *cert. den.* 373 U.S. 922, 10 L.Ed. 2d 423. In some cases where the injuries are obvious to jury inspection, medical evidence is not required, but competent medical testimony usually is required to justify damages for future pain and suffering when the injuries are such that they cannot be objectively determined or that a jury of laymen cannot know with reasonable certainty that there will be future pain and suffering. *Hack v. State Farm Mutual*, S.Ct. of Wis. (1967) 154 N.W. 2d 320.

In 1967, the Supreme Court of Oklahoma held that a fractured jaw, loss of teeth, possible concussion and back injuries were not the kind of injuries which would allow the award for future pain and suffering damages without supporting medical testimony. *Maples v. Bryce*, S.Ct. of Okla. (1967) 429 P.2d 741. Where the symptoms of the claimed injury are subjective in nature at the time of trial, there must be expert medical testimony as to future pain and suffering to support damages for future pain and suffering, *Day v. Gulley*, S.Ct. of Ohio (1963) 191 N.E. 2d 732. The plaintiff in the *Day* case had neck, wrist, hand and low back complaints but medical witnesses could not make a prediction as to the duration of low back pain in the future.

Another low back case in Wisconsin involved claimed permanent back injuries. There was evidence that the plaintiff had suffered a painful and disabling injury to his back. The plaintiff had testified his back was painful and interfered with his work and sleep. The court observed "there was, however, no medical evidence that the back condition was permanent or was likely to cause future pain and suffering" and held that an award for future pain and suffering when the symptoms are subjective in nature must be supported by the opinion of a medical expert which is based upon a

medical certainty or probability. *Ostreng v. Lowery*, S.Ct. of Wis. (1968) 155 N.W. 2d 558.

Thus, we see that at least one circuit, and the Supreme Courts of several states have held there can be no recovery for future pain and suffering without competent *medical testimony* to support the award. The circuit decision, *Campbell v. American Foreign S.S. Corp., supra*, was in a Jones Act case, (which adopts the FELA by reference) thus affording precedent in an FELA case.

The jury award in the instant matter awarded a substantial sum for future pain and suffering. In final argument, only three items of damage were argued by counsel for plaintiff and submitted to the jury. They were *past* wage loss, *past* pain and suffering, and *future* pain and suffering. The amounts requested by counsel for plaintiff in final argument were:

Future pain and suffering	$211,984	83.7%
Past pain and suffering	29,750	11.8%
Past wage loss	11,321	4.5%
	$253,055	100.0%

The jury verdict was in the total sum of $150,000 for all three items of damages combined.

Note that future pain and suffering accounts for 83.7% of the plaintiff's request. If the jury alloted the same percentage share of its award to future pain and suffering, the award would be $125,550. Another way to interpret the jury award would be to assume that the jury gave the exact amounts requested for past pain and suffering and past wage loss, which would leave $108,929 out of the $150,000 total award attributable to future pain and suffering. We do not know exactly what theory the jury followed but by *any* possible theory they must have awarded a very substantial amount of money for future pain and suffering since it is

extremely unlikely that they would have awarded an amount far in excess of that requested by plaintiff for past wage loss and past pain and suffering.

The Ninth Circuit opinion disposes of this argument by stating:

> "Finally, the district court did not abuse its discretion in denying Southern Pacific's motion for a new trial. The damage award of $150,000 was not excessive. There were sufficient facts presented to justify the court's instruction for future pain and suffering and no objection was made to that instruction."

This response misses the point of our argument altogether. Defendant did not appeal because it claims the instruction should not have been given. Since counsel for defendant clearly did not object to the instruction at time of trial, defendant has not contended that the instruction should not have been given. Our contention is that since there is *no evidence* whatever in the record that plaintiff will suffer any future pain and suffering, the jury award for damages for future pain and suffering cannot stand.

The Ninth Circuit cannot create evidence where there is none, simply by stating that it does exist. This issue was incorrectly addressed by the court below.

The issue of future pain and suffering will recur frequently in FELA cases. The railroad employers and employees need a definitive statement by this court to govern the conduct of future FELA cases. This court has not spoken on this issue in the past, so far as petitioner can determine.

Petitioner suggests that the correct standard should be, as stated in the cases cited above, that competent medical testimony that future pain and suffering will occur is a necessary foundation for an award of future pain and suffering in an FELA case.

That foundation clearly is missing in the instant case.

CONCLUSION.

This court should grant certiorari and the judgment below should be reversed.

Respectfully submitted,

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